STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2003
v	No. 232430 Genesee Circuit Court
TODD WILLIAM LUTZE, Defendant-Appellant.	LC No. 00-006795-FC

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

Defendant was convicted of first-degree felony murder, MCL 750.316, and first-degree child abuse, MCL 750.136b(2). He was sentenced as a second habitual offender, MCL 769.10, to life imprisonment without parole for the murder conviction and 100 to 180 months' imprisonment for the child abuse conviction. He appeals as of right. We affirm defendant's conviction and sentence for felony murder, but vacate his conviction and sentence for first-degree child abuse.

Defendant's convictions arise from the death of the seventeen-month-old child of defendant's live-in girlfriend, Amy Barnette. The child had been left in defendant's care while Barnette was at work. Defendant called Barnette at work and asked her to return home because something was wrong with the child. When Barnette arrived home, the child was not breathing. Barnette called "911" for assistance and defendant's voice could be heard in the background during that call. However, when the police and paramedics arrived, defendant was not present.

The child suffered severe injuries, resulting from both shaking and blunt force trauma. The medical testimony established that the injuries were so severe that the child probably lapsed into a coma almost immediately. Barnette testified that, before she left for work that morning, the child was awake and acting normal. There was evidence that defendant made statements to several friends indicating that, while caring for the child, he dropped the child on the floor after she defecated on the floor and on him.

The defense theory at trial was that someone other than defendant, including the child's mother, inflicted the child's severe injuries earlier, but that the child did not lapse into a coma until later, when defendant was watching the child.

I

Defendant argues that the trial court erred by refusing to admit into evidence a videotape of the child that Barnette made approximately one month before her death. Defendant offered the videotape in support of his theory that someone other than himself was responsible for the injuries that caused the child's death. The trial court excluded the evidence, apparently concluding that it was too remote and, therefore, not relevant.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v McAlister,* 203 Mich App 495, 505; 513 NW2d 431 (1994). This includes evidence that is offered to incriminate another person for the charged offense. *People v Kent,* 157 Mich App 780, 792-793; 404 NW2d 668 (1987).

We agree that the events depicted on the videotape were too remote to have any relevancy to this case. Indeed, defendant did not contend that the videotape depicted any of the injuries that allegedly caused the child's death. The trial court did not abuse its discretion by excluding this evidence. Moreover, the trial court's failure to view the videotape before making its ruling does not require reversal. Neither party asked the court to view the videotape. The court was able to properly decide the issue on the basis of the detailed offer of proof that was made. Furthermore, our own review of the videotape supports the conclusion that it was not relevant. In this regard, we disagree with defendant's claim that the videotape was material evidence of abuse by others similar to that which caused the child's death. A review of the videotape fails to disclose any abuse or injuries that even remotely resemble the extreme and severe injuries that caused the child's death. The videotape did not constitute competent evidence, beyond a mere suspicion or speculation, that someone other than defendant was responsible for those injuries. *Id.* at 793.

II

Defendant argues that the trial court erred by failing to instruct the jury on third-degree child abuse. We disagree.

We review claims of instructional error de novo. *People v Bartlett,* 231 Mich App 139, 143; 585 NW2d 341 (1998). In *People v Cornell,* 466 Mich 335, 353-359; 646 NW2d 127 (2002), our Supreme Court held that MCL 768.32 only permits a jury to consider necessarily included lesser offenses, not cognate lesser offenses. See also *People v Alter,* 255 Mich App 194, 200-201; 659 NW2d 657 (2003) (holding that *Cornell* is binding precedent on the issue whether a trial court is permitted to instruct on cognate lesser included offenses). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Cornell, supra* at 357.

"A cognate offense has some elements in common with the charged offense. It also has elements not found in the charged offense." *People v Bearss,* 463 Mich 623, 627; 625 NW2d 10 (2001). In contrast, all of the elements of a necessarily included lesser offense are found within the greater offense. *Id*. Accordingly, it is impossible to commit the greater offense without first committing the lesser offense. *Id.*

The only difference between first-degree child abuse and third-degree child abuse is that the former requires the additional element of *serious* harm to the child. We disagree with the prosecutor's argument that third-degree child abuse should be considered a cognate lesser offense of first-degree child abuse simply because the former requires only "physical harm" while the latter requires "serious physical harm." All of the elements of third-degree child abuse are found within first-degree child abuse, with the exception that the latter offense requires that the physical harm be serious. Thus, we find that third-degree child abuse is a necessarily included lesser offense of first-degree child abuse. Accordingly, the trial court was required to instruct on third-degree child abuse if "a rational view of the evidence would support it." *Cornell, supra* at 357.

MCL 750.136b(1)(f) defines "serious physical harm" as "any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut." In contrast, MCL 750.136b(1)(e) defines "physical harm" as "any injury to a child's physical condition."

There was no dispute among the expert witnesses, including defendant's own witness, that the child died after suffering a serious physical injury. Indeed, it was undisputed that she suffered brain damage as defined in MCL 750.136b(1)(f). The defense only disputed whether it was defendant who inflicted those injuries, or whether defendant acted with the necessary intent to cause the injuries. Under these facts, an instruction on third-degree child abuse was not supported by a rational view of the evidence. Therefore, the trial court did not err in refusing to instruct on that offense. *Cornell, supra* at 357.

Furthermore, because the jury was also instructed on second-degree child abuse, the jury's rejection of that intermediate offense demonstrates that any error in failing to instruct on third-degree child abuse was harmless. *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997).

III

Next, defendant argues that the trial court abused its discretion by denying his motion for a mistrial. *McAlister, supra* at 503. We disagree.

During trial, two prosecution witnesses made reference to the fact that defendant had a criminal record or had been incarcerated in jail at some point. These references did not warrant a mistrial. A mistrial is generally not required where a witness provides an unresponsive answer and there is no indication that the prosecutor played a role in encouraging the witness to give the response or knew that the witness would provide unresponsive testimony. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995); *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Here, the prosecutor's questions to the witnesses were not calculated at eliciting the responses regarding defendant's prior record or criminal past. The trial court did not abuse its discretion by denying defendant's request for a mistrial.

Defendant also claims that the prosecutor committed misconduct when he stated in closing argument that defendant had called the child "a little bitch." We agree that the

prosecutor's remark was improper because there was no evidence that defendant made the statement.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267 nn 5-7; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Here, defendant immediately objected to the erroneous remark and the trial court sustained the objection and instructed the jury to disregard the remark. The court's instruction was sufficient to cure any error.

Defendant also argues that the prosecutor improperly appealed to the jurors' sympathy for the victim during his rebuttal argument. We disagree. The challenged remarks did not constitute an obvious plea to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

IV

Next, defendant argues that his dual convictions for both felony murder and the predicate felony, first-degree child abuse, violate his double jeopardy protections. We agree.

It is well established that convictions and sentences for both felony murder and the predicate felony constitute multiple punishments for the same offense and thereby violate double jeopardy protections under the state constitution. *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Although the prosecutor argues that the Legislature intended to allow punishment for both offenses, the appellate courts of this state have repeatedly held that dual convictions for felony murder and the predicate felony are prohibited. See *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001); *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001); *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998). Although the prosecutor cites authority from other jurisdictions in support of its position, we are bound to follow the controlling precedent of our Supreme Court on this issue. *O'Dess v Grand Trunk Western R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996).

Accordingly, we vacate defendant's conviction and sentence for the predicate felony, first-degree child abuse, and remand for preparation of an amended judgment of sentence. *Coomer, supra* at 224. Resentencing is not required, however, because defendant received a mandatory sentence for his felony murder conviction.

V

In a pro se supplemental brief, defendant alleges numerous acts of misconduct by the prosecutor. He alleges that the prosecutor (1) denigrated defense counsel and called defendant a liar, (2) intentionally interjected emotional appeal into the trial, (3) intentionally and deliberately violated the court's rulings and instructions, (4) deliberately and intentionally offered unsubstantiated evidence of defendant's prior bad acts, and (5) improperly presented new arguments during his rebuttal argument.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Bahoda*, *supra* at 266-267 nn 5-7. Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *McElhaney*, *supra*. Here, however, most of the alleged errors were not preserved with an appropriate objection at trial. Accordingly, we review those issues for plain error affecting defendant's substantial rights. *People v Schutte,* 240 Mich App 713, 720; 613 NW2d 370 (2000). A review of these claims reveals that defendant has not established plain error affecting his substantial rights. Moreover, with regard to those matters that were preserved, most involved matters to which the trial court responded promptly and appropriately, thereby curing any error. Defendant has not established that the prosecutor's conduct deprived him of a fair trial.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Michael J. Talbot